Petition

NO. 81-1338

Office - Supreme Court, U.S.
FILED
JAN 6 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM,

UNITED STATES OF AMERICA

versus

ARROW TRANSPORTATION COMPANY
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where the time lapse between the accidental sinking of a barge and the filing of suit by the United States to recover the cost of raising the wreck exceeds twenty-eight years, where the District Court held the suit barred by the Doctrine of Laches, and where the Circuit Court Described the case as "...A textbook case of Laches...", did the Circuit Court err in reversing the District Court and Remanding the case for further trial?

Where the United States removes a wreck to facilitate private construction, on a bridge owned and operated by a private railroad company, did the Circuit Court err in holding the United States was acting in its "...sovereign capacity...", in refusing to apply the Doctrine of Laches to a case which the court itself described as "...a textbook case of Laches..." and in which the time lapse between the accidental sinking and the filing of suit exceeded twenty-eight years?

In a suit by the United States to recover the cost of raising a barge which sinks by accident, did the Circuit Court err in remanding the case to the District Court for consideration of whether the defendant violated 33 U.S.C. §403 and was "absolutely liable" for the cost of raising the barge?

PARTIES TO THE PROCEEDING

1. The United States of America

2. Arrow Transportation Company, in personam

3. Tennessee Valley Sand & Gravel Company, in personam

4. M/V ALAMO (ex-ATCO), in rem

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versus

ARROW TRANSPORTATION COMPANY
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIFTH CIRCUIT

The Petitioner, Arrow Transportation Company, prays that a Writ of Certiorari be issued to review the opinion and judgment of the Court of Appeals, Fifth Circuit rendered in these proceedings.

OPINIONS BELOW

Jurisdiction of the District Court.

The Complaint of the United States against Petitioners, Arrow Transportation Company, et al, was filed on May 12, 1977, seeking recovery for the cost of "wreck removal", of Barge W-222, owned by J. P. McDonough, which sank at Mile 304.4 of the Tennessee River on January 24, 2949. Jurisdiction of the District Court was invoked on the basis that the proceeding was an admiralty and maritime proceeding within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and under 28 U.S.C. §1345.

Opinion of the District Court.

The Opinion of the the Honorable Frank B. McFadden, Chief Judge, United States District Court for the Northern District of Alabama, was entered on March 30, 1979. The District Judge held that where there is a delay of twenty-eight (28) years between the sinking of a barge and the filing of suit by the Government to recover the cost of removing the wreck, during which delay much of the relevant evidence has become unavailable, and the decisions of the United States Supreme Court refusing to apply laches are not recent, a more recent decision of the Supreme Court assumes laches to be applicable to a denaturalization proceeding [See: *Costello v. U.S.*, 365 U.S. 265, 282, 81 Ct. 534 (1961)], and very recently the Supreme Court has noted that laches would be applicable to a proceeding by the E.E.O.C. [See: *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 355, 373 (1977)], the validity of the prior decisions on laches is in question. The District Court further stated that while there is Fifth Circuit authority for the proposition that the Government is not subject to the defense of laches, the same court, in *E.E.O.C. v. Griffin Wheel Co.*, 511 F. 2d. 456, 459 (5th Cir. 1975) stated that even though the government was attempting to vindicate rights belonging to the sovereign, laches would be an applicable defense. Based on the reasons set forth above, the clear prejudice to the defendants caused by the delay and the fact that governmental immunity from both actions and defenses has been "greatly eroded", specifically exemplified by the many exceptions to sovereign immunity created by Congress itself, the District Court held that laches was an applicable defense in this case and the claim of the United States was barred. The District Court also rejected the claim of the United States that 33 U.S.C. §403 seeking to create "absolute liability" on the part of the defendants and held the Government was

required to prove negligence (*infra*, Appendix B., pp. 1-9).

Opinion of the Fifth Circuit.

The Opinion of the Fifth Circuit (*infra*, Appendix A., pp. 1-4) can be summed up by quoting its statement at p. 3:

> Although the fact situation describes a textbook case of laches, that defense cannot be asserted against the United States in its soverign capacity to enforce a public right or to protect the public interest.

The Circuit Court, stating that it did not "reverse lightly", nevertheless, reversed the District Court as a matter of law. The case was remanded to the District Court for a determination of: (1) whether on the facts defendants were negligent; (2) whether Arrow was an owner for the purposes of 33 U.S.C. §409; (3) whether Arrow violated either 33 U.S.C. §403 or 33 U.S.C. §409, or both; and (4) whether 33 U.S.C. §411 penalties should be imposed.

JURISDICTION

The judgment of the United States District court for the Northern District of Alabama was entered on March 30, 1979, (*infra*, Appendix B., pp. 1-9), dismissing the Complaint of the United States of America. It is final by its terms.

The United States appealed to the United States Court of Appeal, Fifth Circuit. The decision of the Court of Appeal, Fifth Circuit, Unit B, was entered on October 8, 1981, reversing the District Court and remanding the

case for further trial. Rehearing or Alternative Rehearing EnBanc was requested timely with the petition being denied on November 9, 1981 (*infra*, Appendix C, pp. 1).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES IN QUESTION

33 U.S.C. 403:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. 409:

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to

prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such a manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft or other craft is wrecked and sunk in navigable channel, accidently or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in Sections 411 to 416, 418, and 502 of this title.

33 U.S.C. 411:

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of Sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

33 U.S.C. 412:

Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in Section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in Section 408 of this title, or who shall willfully obstruct the channel of any waterway in the manner contemplated in Section 409 of this title, shall be deemed guilty of a violation of Sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, 686, and 687 of this title, and shall upon conviction be punished as provided in Section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of Sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in Section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

STATEMENT OF FACTS

On January 24, 1949, the M/V ATCO (now known as the M/V ALAMO) was proceeding downstream on the Tennessee River with a tow of four barges. The tow

struck the Keller Memorial Highway Bridge at Decatur, Alabama, Barge W-222 broke away from the tow, drifted downstream, and sank in eleven feet of water against one of the piers of the South Railroad Bridge at Mile 304.4 of the Tennessee River. The barge was under bareboat charter to Petitioner, Arrow Transportation Company. The M/V ATCO (now the ALAMO) is owned by Tennessee Valley Sand & Gravel Company (Petitioners Arrow Transportation Co., Tennessee Valley Sand & Gravel Co., and the M/V ATCO are hereinafter, collectively, referred to as "Arrow"). Both the Tennessee Valley Authority (hereinafter "TVA") and the United States Coast Guard were aware of the incident soon after it occurred, investigated and rendered reports on the accident.

In 1972, the United States Corps of Engineers was informed of the presence of the wreck by the TVA. The Corps made soundings of the wreck and subsequently demanded the removal of the wreck by Arrow (*infra*, Appendix B., pp. 1-9). By letter of January 19, 1973, the Corps stated:

> Because of the increased and varied use of our lakes and rivers for both commercial and recreational purposes, and recent Court decisions, *all* sunken vessels are now *generally* considered real or *potential hazards* to the public, *regardless of where the craft sank.* (Defendant's Ex. 10, emphasis added.)

Following initial correspondance between the parties, the Corps directed the following demand to Arrow on October 3, 1973:

> The barge located against the upstream side of the Southern Railroad Bridge at Mile 304.4, Tennessee River, is presently of major concern. The ex-

> peditious removal of this barge is necessary because it is located in the [proposed] channel opening of a lift span *to be constructed* in this bridge to replace the existing lift span. (*infra*, Appendix D., Defendant's Ex. No. 11 pp. 1-2).

Despite the alleged hazard posed by W-222, neither the Corps of Engineers nor the Coast Guard marked the wreck, indicated the wreck on charts or issued any notice to mariners warning of the position of the wreck (Tr., Vol. 2, p. 57). Removal of the barge by the Corps of Engineers was completed on January 8, 1975. During the two year period between the Corps' demand that the barge be removed and the actual removal of the barge, the wreck was neither marked nor listed on notices to pilots (*infra*, Appendix B., pp. 1-9). The Southern Railroad Bridge, referred to above in the Corps' demand that the wreck be removed, is owned by the Southern Railroad and was being rebuilt as the result of Tennessee Valley Authority Planning Report No. 3-506 (Defendant's Ex. No. 4) which indicated that the Southern Railroad Bridge, as then constructed, and the bridge over the Illinois River at Peoria, Illinois, were the most hazardous spots on the entire 9,000 miles of inland waterways.

On May 12, 1977, over twenty-eight years after the initial accident, this action was filed to recover the cost of removing the barge. During the twenty-eight year delay, much of the relevant evidence became unavailable. The report prepared by the Coast Guard had been destroyed. The Captain of the ATCO was believed to be dead. Defendants had no list of the crew of the tugboat or other possible witnesses to the accident (*infra*, Appendix B., pp. 1-9).

ARGUMENT

Introduction.

At the time Barge W-222 sank, the sinking was investigated by the TVA and the United States Coast Guard, both of whom prepared reports of the accident and both of whom were informed that, since the wreck posed no hazard, there was no intention to remove the wreck. Despite these facts, the Government has taken the position throughout this litigation that there was insufficient notice as to the existence of the wreck, thus excusing the twenty-eight year delay. The barge sank, out of the navigable channel, against a pier of the Southern Railroad Bridge at Mile 304.4 of the Tennessee River, one of the two most dangerous spots on 9,000 miles of inland waterway. The railroad undertook to rebuild the bridge in order to eliminate the hazard posed to navigation. The Corps of Engineers removed the barge to facilitate that private construction. Yet the Government's position throughout has been that it was enforcing a "public right", a position apparently accepted by the Fifth Circuit. It is interesting to note, however, that the Government has not always taken this position and, in fact, has at times taken the position, in actions under 33 U.S.C. § §403 and 409, that it was asserting a proprietary right and had "the same rights which a citizen has to bring actions for the protection of its proprietary rights." *U.S. v. Bethlehem Steel Corp.*, 319 F. 2d. 512, 517 (9th Cir. 1963). As pointed out by the District Court, by subjecting itself to lawsuits seeking equitable relief, or in this case seeking such relief on behalf of the Government, it seems logical that the United States should be subject to equitable defenses. (*infra*, Appendix B., pp. 1-9).

While the above points are indicative of the various contradictory positions the Government has taken in this and other litigation, of more immediate concern is the present posture of this lawsuit. The facts as found by the District Court have not been questioned by the Fifth Circuit. The Fifth Circuit reversed the District Court as a matter of law, without questioning the finding of fact and, with the exception of the question of laches, has not reversed the lower court's legal conclusions. Yet, while the District Court held that the United States had no cause of action for wreck removal under 33 U.S.C. §403, (*infra*, Appendix B., pp. 1-9), the Fifth Circuit has suggested that, while it expresses no view on the point, on remand the District Court should reexamine its view of whether "Arrow violated 33 U.S.C. §403 . . . ". (*infra*, Appendix A, pp. 1-5). The District Court has found that Arrow was prejudiced by the twenty-eight year delay by the Government in seeking removal of the wreck and filing suit to the point that Arrow is incapable of defending the claim. The Fifth Circuit has agreed that this is "a textbook case of laches . . . "; however, at the same time the case has been remanded for a determination of what must now, with no defense available, be considered a foregone conclusion: "whether on the facts defendants were negligent." Additionally, the District Court has been directed to consider whether the criminal penalties of 33 U.S.C. §411 should be imposed.

We respectfully suggest that Certiorary be granted to clarify the law both as to wreck removal and laches. Under the facts of this case, it is clear that the doctrine of laches should bar the Government's claim. The Government's delay of twenty-eight years has so prejudiced the Petitioners as to preclude any defense of the claim. Under these facts whether the Government is protecting "public" or "proprietary" interests, there are

corresponding public interests which require the application of laches to prevent irreperable prejudice to the rights of citizens to defend themselves in a court of law. More importantly, the actions of the Corps of Engineers in this case were on behalf of a private party, the Southern Railroad. The Corps was doing nothing more than the railroad itself would have been required to do to eliminate a hazard to navigation it had created. Additionally, this case offers the Court the opportunity to address the question of "absolute liability" for wreck removal under 33 U.S.C. §403, a position refuted by the Third Circuit, which the Government now attempts to establish in the Fifth Circuit [See: *U.S. v. Ohio Barge Lines, Inc.*, 607 F. 2d. 624 (3d. Cir. 1979)].

WHERE THE TIME LAPSE BETWEEN THE ACCIDENTAL SINKING OF A BARGE AND THE FILING OF SUIT BY THE UNITED STATES TO RECOVER THE COST OF RAISING THE WRECK EXCEEDS TWENTY-EIGHT YEARS, WHERE THE DISTRICT COURT HELD THE SUIT BARRED BY THE DOCTRINE OF LACHES, AND WHERE THE CIRCUIT COURT DESCRIBED THE CASE AS "...A TEXTBOOK CASE OF LACHES...", THE CIRCUIT COURT ERRED IN REVERSING THE DISTRICT COURT AND REMANDING THE CASE FOR FURTHER TRIAL.

A review of the case shows ample evidence to support the District Court's findings. The court found that Barge W-222 sank on January 24, 1949 and the Corps of Engineers did not request that Arrow move the barge until 1973. From this the court concluded that the Corps did not proceed in a reasonable manner. Even after the Corps requested that Arrow remove the sunken barge in 1973, as an alleged obstacle to navigation, the Corps took no further action to have the vessel removed for

two years. As the District Judge stated:

> In the interim between the time the Corps of Engineers wrote the defendants and the removal, the wreck was not marked and was not listed on notices to pilots.

The trial Court found that, in 1949, both the TVA and the U.S. Coast Guard were aware of and informed of the wreck's position by Arrow. "Both investigated the accident and prepared reports on it." Yet the government failed to act. Judge McFadden, the District Judge, found that in the delay of twenty-eight years from the time of the accident to the filing of the action, much of the relevant evidence became unavailable. The Coast Guard report was destroyed and the Captain of the tug was believed dead. From this the Court concluded that, under the criteria set out in *Costello v. United States*, 365 U.S. 265 (1961), the government was not diligent in pursuing its actions and the delay prejudiced the defendant.

In *U.S. v. Wilson*, 235 F. 2d. 251, 252 (2d. Cir. 1956), a case factually similar to the case at bar, a delay of thirteen years by the government in commencing suit against owners of a sunken vessel was found to be inequitable. While the Court of Appeals dismissed the claim on the grounds that a sunken barge was not a structure under §403, the court noted that invoking the doctrine of laches, in light of the facts and applicable law, was the correct ruling.

Judge McFadden correctly observed that the "unquestioned doctrine that governments are generally immune from actions and defenses had been greatly eroded." There is ample authority to support the position that equitable defenses are appropriate against the government when the defendant is prejudiced by the ac-

tion or inaction of the government. In *U.S. v. Bailey*, 467 F. Supp 925, 930 (E.D.Ark., 1979), the Corps of engineers sought injunctive relief under §403 against the owners of a marina who constructed and maintained a breakwater dike in the Arkansas River at a height greater than permitted. The Court, however, refused to grant injunctive relief and held the government equitably estopped from asserting the illegality of the dike despite the government's protestations of sovereign immunity. Using the same rationale applied by Judge McFadden, the Court noted:

> Although the general statement is still that there can be no estoppel against the government or its agencies, the courts have criticized and cut away at this notion in recent years.
>
> Estoppel or no estoppel against the government was traditionally, and in some cases still is, made to depend upon the distinction between performance of a governmental as distinguished from proprietary function and upon the agent's conduct as within or beyond the scope of his authority in a particular situation. In recent cases, however, the courts have turned away from these traditional pigeonholes and considered the basic question of what is justice in a particular situation, concerning themselves only with determining whether the proper elements of an equitable estoppel were present, and whether recognition of these equities to estop the Government will harm the public's interest. (emphasis added) (467 F. Supp. 931).

The principle in *Bailey* that justice and fair play demand that sovereign immunity yield when overwhelming prejudice to the defendant results from the sovereign's inaction has been articulated in other suits involving public rights. For example, in *Hines, Inc. v. United States*, 551 F. 2d. 717, 729 (6th Cir. 1977), a case involving the Limitation of Liability Act, the court

noted that when delay by the government was shown to be damaging to the defendant, the doctrine of laches would allow the defendant to prevail. Similarly, in *U.S. v. Boyd*, 520 F. 2d. 642 (6th Cir. 1975), the Court of Appeals sustained the District Court's finding of fact that the government's suit for recovery of removal costs for a *negligent* sinking was timely but observed that laches would be an appropriate vehicle for relief to the defendant if lack of diligence resulted in prejudice to the defendant, as found by Judge McFadden in the instant case. The court said;

> [I]f the government should delay too long in removing a sunken vessel and then seek restitution, the owners of the sunken vessel could *validly assert the defense of laches,* inasmuch as laches would then be an equitable defense to an equitable cause of action, namely restitution. (520 F. 2d. 645).

The balance of traditional notions of sovereign immunity against deprivation of fundamental rights of the defendant after prolonged government inaction was recently recognized and applied by this Court in *Occidental Life Insurance Company of California v. EEOC*, 432 U.S. 355 (1977). While the Fifth Circuit contends that *Occidental* is inapposite, we suggest that the balancing rationale articulated by this Court in that case has been consistently applied where fundamental fairness to the defendant demands such a result. In every decision where lack of due diligence by the government and accompanying prejudice to the defendant has been factually established, the defendant has prevailed. For example, in *Bailey* and *Wilson, supra,* the court found the passage of time and the oppressive consequences of inaction to the defendant necessitated a finding that the efforts by the Corps came "far too late and the harm caused thereby to the defendants [was] unjust"

(467 F. Supp. 931). In *U.S. v. Richard J. Moran*, 201 F. Sup. 570 (D. Me. 1962) the court held that a lapse of thirteen years by the government in seeking *in rem* relief against a vessel and the concomitant prejudice to the vessel's owners justified applying the doctrine of laches — even against the United States. Citing Judge Soper in *The Falcon*, 19 Fed. 1009, the court maintained:

> Where the rights of an [innocent purchaser of a vessel] do intervene, *it is obvious that grave injustice will be done by permitting the U.S. to proceed with its claim irrespective of its negligent and harmful delay.* (Emphasis added; 201 F. Supp. 573).

Conversely, in the cases relied upon by the Fifth Circuit, the elements of laches, *i.e.* inexcusable delay and resulting prejudice to the defendant, were absent. A careful scrutiny of these and other cases indicates that regardless of the party against whom laches was raised, the defense would have been without merit. For example, in *Weiszmann v. U.S. Corps of Engineers*, 526 F. 2d. 1302 (5th Cir. 1976), the Fifth Circuit affirmed the lower court's ruling that laches was unavailable to a developer seeking relief against the Corps. Citing *U.S. v. Summerlin*, 310 U.S. 414 (1940), and *Costello v. U.S.*, 365 U.S. 265 (1961), whose inapplicability will be discussed below, this Court stated that the government was not subject to laches *but* that even *if it were*, "this was not the case" (526 F. 2d. 1305-06). Since the decision affirmed the lower court's ruling that the delay was not unreasonable and that no prejudice was inflicted on the developer, we submit *Weiszmann* is clearly distinguishable from the instant case wherein Judge McFadden made a factual finding that the elements of laches, *i.e.* inexcusable delay and prejudice to the defendant, were present.

In *U.S. v. Summerlin, supra*, the defense of laches was

raised due to the government's four month delay in asserting a lien against defendant's estate. While the court rejected the defense of laches against the government, it was not faced with an inordinate and prejudicial delay. Similarly, in *Chromcraft Corp. v. United States EEOC*, 465 F. 2d. 745 (5th Cir. 1972), no prejudice was shown by the lapse of one year before notifying an employer of pending charges. Nor, in *Simmonds Precision Products, Inc. v. United States*, 546 F. 2d. 886, 892 (Ct. Cl. 1976), was there sufficient evidence of prejudice to support defendant's defense of laches.

In *Costello v. U.S.*, 365 U.S. 265 (1961), a notorious mobster, sought to invoke laches against the government in a denaturalization proceeding. Both elements of laches, lack of diligence and prejudice to the petitioner, were absent (365 U.S. 282). The government's delay in revoking the petitioner's naturalization certificate for participation in bootlegging activities was not found to be prejudicial where the petitioner willfully misled the government and ignored statutory criteria for citizenship. The same type of deliberate disregard for agency regulation precluded the defendant developer in *U.S. v. Sexton Co. of Estates, Inc.*, 389 F. Supp. 602 (S.D.Fl. 1975), *aff'd. in part, rev. in part*, 526 F. 2d. 1293 (5th Cir. 1976), from showing that he was "affirmatively misled" by the Corps. It should be noted that laches was not an issue on appeal.

The jurisprudence demonstrates that Judge McFadden correctly found the alleged prohibition of laches as a defense against claims by the government was, at best, an archaic generalization. In the "traditional" cases relied upon by the Fifth Circuit to support the hypothesis that the doctrine of laches does not bar a claim by the government, laches would not have been a

viable defense regardless of the identity of the party against whom it was raised. In contrast to the case at bar, the necessary elements of laches were simply missing and the sovereign immunity doctrine served as no more than an expeditious method of disposing of cases where laches or other equitable defenses were without merit [See: *U.S. v. Bailey*, 467 F. Sup. 930-31]. To be sure, a case-by-case analysis is necessary to establish whether or not the government's delay or inactivity is reasonable. Conversely, however, administrative quagmires cannot be tolerated where the end result is obvious injustice to the defendant. The applicable jurisprudence demonstrates both that laches is an appropriate defense against the sovereign and that fundamental fairness mandates such relief where the defendant is significantly handicapped in making a defense, as in the instant case. To hold to the contrary would encourage administrative inaction to the detriment of the public and create a condition contrary to the precepts cited in support of the sovereign's immunity to laches. That is, the refusal to impose laches is based on the proposition that the sovereign's enforcement of a public right should not be barred due to administrative inaction; however, the failure to impose laches, as in this case, where the delay creates irreversible prejudice, would in fact encourage the inertia from which administrative agencies already suffer.

WHERE THE UNITED STATES REMOVES A WRECK TO FACILITATE PRIVATE CONSTRUCTION, ON A BRIDGE OWNED AND OPERATED BY A PRIVATE RAILROAD COMPANY, THE CIRCUIT COURT ERRED IN HOLDING THE UNITED STATES WAS ACTING IN ITS "...SOVEREIGN CAPACITY...", IN REFUSING TO APPLY THE DOCTRINE OF LACHES TO A CASE WHICH THE

COURT ITSELF DESCRIBED AS "...A TEXT-BOOK CASE OF LACHES..." AND IN WHICH THE TIME LAPSE BETWEEN THE ACCIDENTAL SINKING AND THE FILING OF SUIT EXCEEDED TWENTY-EIGHT YEARS.

A reading of the Fifth Circuit's opinion shows that the Court refused to address the cases, on point, cited in the previous argument and in brief to the Fifth Circuit, which, along with others, address the issue of laches. Instead, the Court chose to focus on that portion of the District Court's opinion citing decisions holding that actions by an administrative agency of the government, the E.E.O.C., may be barred by the doctrine of laches, in order to establish its argument that, as a matter of law, laches should not bar the government's claim in this case. According to the Fifth Circuit's rationale, the lack of Fifth Circuit authority, other than in cases involving the E.E.O.C., applying the doctrine of laches against the United States precluded the application of laches in the present case. The court found it unnecessary to reconcile the E.E.O.C. cases "[b]ecause the instant case does not involve the E.E.O.C.". The Court's refusal to view the E.E.O.C. cases as authority, or even as persuasive because the instant case does not involve the E.E.O.C. lacks weight since, if that same rationale were applied to the cases upon which it relies, those cases to which the Fifth Circuit looks for support should have no bearing on the present case and should not be viewed as persuasive since they do not address wreck removal. See: *U.S. v. California*, 332 U.S. 19, 67 S. Ct. 1658 (1947); U.S. v. Summerlin, 310 U.S. 414, 60 S. Ct. 1019 (1940); *Costello v. U.S.*, 365 U.S. 258, 81 S. Ct. 534, *Weiszmann v. Dist. Eng., U.S. Army Corps of Eng.*, 526 F. 2d. 1302 (5th Cir. 1976); *U.S. v. Southern Pac. Transp. Co.*, 543 F. 2d. 676 (9th Cir. 1976).

Admitting the erosion of the principles upon which it relies, the Fifth Circuit refused to accept the decision of the lower court, stating:

> . . .although the trial court correctly stated the general principle that "the once unquestioned doctrine that governments are generally immune from actions and defenses has been greatly eroded "by the Congress and the Supreme Court, neither of these bodies nor the Fifth Circuit has overturned established precedent applicable to the present case. (*infra*, Appendix A, pp 5).

This is a surprising statement from a court which has prided itself on being at the "cutting edge" of the law on so many previous occasions. More importantly the statement makes an unwarranted assumption. The Fifth Circuit assumes that the government is seeking to enforce "a public right". There is no support either in that court's opinion or the record itself for such an assumption.

As Defendant's Exhibit 11 (*infra*, Appendix D., pp. 1-2) shows, the barge which the government removed was resting against a pier of the Southern Railroad Bridge, where it had been for some twenty-six years. The barge was removed to facilitate rebuilding of the railroad's bridge, a task which, in the normal course of events, should have been performed by the railroad. As was re-emphasized to the Court in the application for rehearing *en banc*, Tennessee Valley Authority Planning Report No. 3-506 (Defendant's Exhibit 4) had shown the bridge to be one of the two most hazardous points on the inland waterways. The rebuilding of the bridge, a Southern Railroad project, as shown by Exhibit 11, required the removal of the barge. In addition to the barge being in the "proposed [new] channel", the bridge pier

against which it rested was in the proposed new channel. The fact that the Corps of Engineers chose to undertake the removal of the barge rather than letting the railroad, which had also left the barge untouched for twenty-six years, remove it does not in any way, shape or form suggest that the Corps was enforcing a "public right". The public's right was to a waterway unobstructed by a hazardous bridge. The elimination of the hazardous condition created by the Southern Railroad's bridge was the enforcement of a public right. The removal of the bridge pier and, necessarily, the barge which rested at its base was the enforcement of a "private action" by the Corps of Engineers no different than the actions by the E.E.O.C. which the Fifth Circuit found inapplicable to the present case. If the railroad had removed the barge and sought recovery against Arrow after twenty-eight years, under the same circumstances, we would not be before this Court. Unfortunately, because the Corps of Engineers undertook this action after twenty-eight years, to the complete prejudice of Arrow, an action unjustified as either a "public" or "private" act, we must respectfully request that this Court grant certiorari to examine both the question of laches and the Fifth Circuit's assumption that the Corps of Engineers was enforcing a "public right".

IN A SUIT BY THE UNITED STATES TO RECOVER THE COST OF RAISING A BARGE WHICH SINKS BY ACCIDENT, THE CIRCUIT COURT ERRED IN REMANDING THE CASE TO THE DISTRICT COURT FOR CONSIDERATION OF WHETHER THE DEFENDANT VIOLATED 33 U.S.C. §403 AND WAS "ABSOLUTELY LIABLE" FOR THE COST OF RAISING THE BARGE.

The government has contended throughout that §403 gives the Corps of Engineers the prerogative to label

anything whether a vessel, solid waste, or structure, an "obstruction". That argument ignores the established law. The specificity with which the various sections of the Rivers and Harbors Act address separate navigational hazards supports the contention that the statutes are not coextensive. The particularity with which §409 limits liability for removal costs to negligent incidents must, under established principles of statutory interpretation, prevail over the broader general scope of §403. As held in *Morton v. Mancari*, 417 U.S. 599 (1974), a specific statute should not be controlled or nullified by a general statute, regardless of the priority of the enactment. If §403 is interpreted to allow recovery of removal costs without proof of negligence, §409 becomes meaningless. In the absence of express congressional intent to the contrary, the courts, as found by the District Court in this case, should not judicially nullify the clear and specific meaning of Section 409.

Neither the legislative history nor the decisions of the Supreme Court can be interpreted to extend the coverage of a general statute dealing with wharves, piers, excavations and filling in (§403), to the exclusion of a specific statute dealing with obstruction of navigable waters by vessels and marking and removal of sunken vessels (§409). This Court has specifically refrained from such a decision [See: *Wyandotte Transportation Co. v. U.S.*, 389 U.S. 191, 196 (1967)].

The legislative history of the Rivers and Harbors Act of 1899 has been set out on numerous occasions [See: *U.S. v. Pennsylvania Industrial Chemical Corporation*, 411 U.S. 655, 93 S. Ct. 1804 (1973) (dealing with 33 U.S.C. §407); *Wyandotte Transportation Co. v. U.S.*, 389 U.S. 191, 88 S. Ct. 379 (1967) (dealing with 33 U.S.C. §409); *U.S. v. Standard Oil Corp.*, 384 U.S. 224, 86 S. Ct.

1427 (1966) (dealing with 33 U.S.C. §407); *U.S. v. Republic Steel Corp.*, 362 U.S. 482, 80 S. Ct. 884 (1960) (dealing with 33 U.S.C. §403); *U.S. v. Kennebec Log Driving Co.*, 491 F. 2d. 562 (1st Cir. 1973) (dealing with 33 U.S.C. §410). As pointed out by both the Fourth and Fifth Circuits, "clarity of draftsmanship is not [its] hallmark". *U.S. v. Univ. Tex. Med. Branch at Galveston*, 557 F. 2d. 438, 442 (5th Cir. 1977). However, an examination of the Act and, more particularly, the cases interpreting it reveals that there has been neither an intent, evidenced on the part of Congress, nor an interpretation by this Court, to apply §403 to wrecks either in connection with or in lieu of §409.

The legislative history does reveal a body of law, enacted as the Act of March 3, 1899, ch. 425, 30 Stat. 1151, *et seq.*, collectively known as the Rivers and Harbors Appropriations Act. As originally enacted, §15 of the Act (33 U.S.C. §409) banned the floating of "loose timber and logs" and "sack rafts of timber and logs" on waterways actually navigated by steamboats whenever it might "obstruct, impede, or endanger navigation". Realizing the 1899 Act contained what amounted to a complete proscription against the movement of logs on navigable waterways, Congress amended the Act in the following session providing an exception to the §15 ban on log driving. Act of May 9, 1900, 31 Stat. 172. Obviously, if §403 had been intended to be all encompassing, as suggested to this Court by the government, by analogy, logs would have constituted a violation under §403 while being excluded under §410. Thus, Congress would necessarily have amended the language of §403 to reflect its intent that logs be given separate consideration. As pointed out in *U.S. v. Kennebec Log Driving Co.*, 491 F. 2d. 562, 565 (1st cir. 1973), the 1899 Act was intended to be a complication of pre-existing law. We

suggest that while the compilation of various individual statutes regarding navigation under one title is logical, the subsequent application of one of the statutes so compiled to eliminate another individual statute from the law is clearly not the intent of Congress.

The 1900 Act, now codified as 33 U.S.C. §410, is but one indication of congressional intent that the individual sections of the Rivers and Harbors Act, particularly §403, should not be given the all encompassing interpretation some lower courts have placed on them. Nor, we suggest, should this Court's decisions be viewed as being painted with the broad brush strokes the government and some lower courts suggest. When examined, the decisions show only that, as to the specific area dealt with by each statute (§403 and "industrial solids" in *Republic Steel*, §407 and "refuse" in *U.S. v. Standard Oil* and *U.S. v. Pennsylvania Industrial Chemical Corp.*, and "wrecks" in *Wyandotte*), the intent of Congress will be interpreted with sufficient breadth to cover problems logically falling within the coverage of the specific statute. The cases do not stand for the proposition that a general statute, such §403, is to be applied to negate a specific statute, such §409.

Justice Douglas' opinion, in *U.S. v. Republic Steel Corp.*, 362 U.S. 482, 80 S. Ct. 884 (1960), is often cited as a basis for applying §403 to sunken vessels. *Republic Steel* was a suit to enjoin the deposit of industrial solids in the Calumet River without a permit, a practice which had been under attack by the Corps of Engineers since 1909. The Court determined the deposition of "industrial solids" to be an "obstruction" to navigation within the meaning of §10 of the Act, which was not exempted by §13 of the Act. Industrial solids had been discharged into the river in liquid suspension, subsequently settling out and reducing the depth of the channel, in some cases

by nine feet or more. After determining that §10 (33 U.S.C. §403) had been enacted to fill the gap created by the Supreme Court's decision in *Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1888), referring to earlier cases interpreting §10, Justice Douglas said:

> The teaching of those cases is that the term "obstruction" *as used in* §10 is broad enough to include diminution of the navigable capacity of a waterway by means not included in the second or third clauses. In the Sanitary District case it was caused by *lowering the water level.* Here it is caused by *clogging the channel with deposits of inorganic solids.* Each affected the navigable "capacity" of the river. The concept of "obstruction" which was broad enough to encompass the former seems to us plainly adequate to include the latter (emphasis added; 362 U.S. 489).

In *Republic Steel,* as in the other cases cited, this Court has been willing to read individual sections of the Rivers and Harbors Act in such a manner as to fill gaps within the area clearly intended by Congress to be covered by the specific statute; however, the Court has not expanded one statute to the point of eliminating another. We suggest that an adoption by this Court of the government's interpretation to §403 will effectively write §409 out of the Rivers and Harbors Act. See: *U.S. v. Ohio Barge Lines, Inc.,* 607 U.S. 624 (3d. Cir. 1979).

In *U.S. v. University of Texas Medical Branch at Galveston,* 557 F. 2d. 438 (5th Cir. 1977), an action against a negligent third party for removal costs, the issue was a shipowner-defendant's ability to limit his liability for wreck removal costs under the Limitation of Liability Act, 46 U.S.C. §181, *et. seq.* For purposes of the decision, the defendant was assumed to be negligent (557 F. 2d. 438, 442). The salient aspect of *Univ. of Texas*

was that negligent non-owners are treated indentically to negligent owners under §409 in that they may ultimately be liable under §409 for removal costs. That §409 was not dispositive is evidenced in the following:

> [The] critical distinction is not between owners of the wrecks and non-owners but between *negligent* and innocent parties. (emphasis added; 557 F. 2d. 446).

If the government's contention that Section 403 imposes absolute liability were correct, then the question of negligence would be of no moment.

We respectfully suggest that this Court clarify those cases which the government views as mandating the application of §403 to wreck removal in lieu of §409. It is imperative that this Court eliminate the anomaly, implied in its previous decisions but never directly addressed, that the owner of a sunken vessel is subject personally for the costs of removal, regardless of fault, when, under the statutory and case law specifically applicable to wreck removal, the owner is liable only on a showing of negligence. [See: *Univ. of Tex. at Galveston, supra,* 557 F. 2d. 443, N. 10). We suggest, as recently stated by Judge Rubin of the Fifth Circuit, the owner of a vessel, sunk without negligence on his part, has the option to raise the vessel or abandon to the government. See: *Tennessee Valley Sand & Gravel Co. v. M/V DELTA,* 598 F. 2d. 930, 934 (5th Cir. 1979). If the non-negligent owner abandons to the government, he is not liable for costs of removal. If the vessel constitutes a hazard to navigation and should the government choose to remove it in a timely manner, the government may seek recovery from the allegedly negligent party. Judge Rubin's summation of the law of wreck removal in *Tennessee Valley Sand & Gravel Co. v. M/V DELTA,* 598 F.

2d. 930, 934 (5th Cir. 1979), although in a somewhat different context, is the present law:

> The *owner* of a vessel sunk *without any negligence* on *his* part is still subject to the statutory obligation to remove the wreck . . ., but [he] *is given an option:* he may *either raise the vessel* himself *and seek recovery of the* expenses *from the party responsible* for the sinking, . . .*or he may abandon* the vessel *and allow the United States* to bear the burden of removal and *recovery of expenses from the negligent party* . . .If the *non-negligent owner* exercises his right to abandon, he *is liable neither for the cost of removal nor for damages suffered by third parties* as a result of the wreck. (emphasis added).

CONCLUSION

The District Court determined that, under the facts of this case, the government's twenty-eight year delay in filing suit for the cost of removal of a sunken barge so prejudiced Petitioners that the government's claim for the cost of wreck removal was barred by the doctrine of laches. The Fifth Circuit did not question those factual findings and, in fact, stated that this was "a textbook case of laches". However, the Fifth Circuit, while recognizing that "the once unquestioned doctrine that governments are generally immune from actions and defenses has been greatly eroded", held that the District Court erred, as a matter of law, in applying the doctrine of laches. The District Court also held that the government had no cause of action under 33 U.S.C. §403 based on Petitioners' alleged "absolute liability" for the removal costs. The Fifth Circuit stated that it would "express no views" on this point but remanded that question to give the District Court the "opportunity to reconsider". We seek a writ of certiorari from this Court

and ask this Court to consider whether, under the facts of this case, the Fifth Circuit's opinion is incorrect.

A remand of the case to consider the negligence of defendants who have been found as an undisputed fact to be unable to defend themselves amounts to a directed verdict on the question of negligence by the Fifth Circuit. The rationale behind refusing to bar claims made on behalf of the government due to the inaction of an administrative body is that a public right should not be prejudiced by bureaucratic inaction. We respectfully suggest that the rationale, as applied in this case, fosters bureaucratic inertia. The knowledge that a failure to act, which prejudices the other party, can result in sanctions leads to timely, reasonable action. The knowledge that a failure to act in a timely fashion does nothing more than eliminate potential opposition can only breed inaction. We suggest that a reasoned application of the doctrine of laches in appropriate cases does not prejudice the public but, rather, creates a system which functions both efficiently and equitably.

The Fifth Circuit has cast its opinion in terms of the government enforcing a "public right". There is nothing in either the record or that court's opinion which supports that finding. The barge in question sank in 1949 at the base of a pier of a railroad bridge characterized as one of the two most hazardous spots on 9,000 miles of inland waterway. The rebuilding of the bridge by the private owner necessitated the removal of the barge. The "public right" was to a waterway without the hazard of the bridge. The private right which the government seeks to enforce is the bridge owner's task of moving the barge as part of the reconstruction process. Had the railroad brought this action after twenty-eight years, there would be no question as to the applicability of laches. The situation is not changed because the govern-

ment, rather than the railroad, created the prejudice.

Finally, we suggest that the government's attempt to establish a doctrine of "absolute liability" in the Fifth Circuit, a doctrine rejected by the Third Circuit, requires action by this Court. We suggest that the Fifth Circuit's position of expressing "no views" on the point while allowing the District Court "the opportunity to reconsider the government's argument", is the clear expression of a view contrary to both the statutory law and the case law. The term "absolute liability" particularly when suggested by the United States government is repugnant. In the context of the Wreck Removal Act, it has no place at all.

We can only suggest as strongly as possible that the equities of this case mandate a grant of certiorari. This case offers the Court the opportunity to clarify questions which have arisen in regard to the Wreck Removal Act and also to state clearly whether the government is subject to equitable defenses in actions in equity. If "the King can do no wrong" is to be the law, so be it. All we can suggest is that, if that is the law, tantalizing phrases such as "...even if we assume the applicability of laches...the petitioner failed to prove the elements which are necessary...", as found in *Costello v. U.S.*, 365 U.S. 265, 81 S. Ct. 534, 543 (1961), and the other cases relied upon by the Fifth Circuit, are a redundancy. We respectfully suggest that a rational line can be drawn between "the King can do no wrong" and the unnecessary forfeiture of public rights. Such a line was drawn by the District Court in this case, erased by the Fifth Circuit, and we now ask this Court to redraw that line so that neither the public right nor the rights of individuals are unreasonably forfeit.

CERTIFICATE

I do hereby certify that I have on this 6TH day of January, 1982, served a copy of the foregoing pleading on all counsel for all parties to this litigation by mailing same by United States mail, properly addressed, first class postage prepaid.

Appendix

Appendix "A"

FORMER FIFTH CIRCUIT

UNITED STATES

versus

ARROW TRANSP. CO.

UNITED STATES of America,
Plaintiff-Appellant,

versus

ARROW TRANSPORTATION COMPANY,
Tennessee Valley Sand & Gravel Company, in personam and M/V Alamo (ex-ATCO), etc., Defendants-Appellees.

NO. 72-2290

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.*
UNIT B

Oct. 8, 1981

The United States brought suit in admiralty under Rivers and Harbors Act of 1899 to recover the cost of removing barge from bottom of Tennessee River and statutory penalties. The United States District Court for

* Former Fifth Circuit case, Section 9 (1) of Public Law 96-452—October 14, 1980.

the Northern District of Alabama, at Florence, Frank H. McFadden, J., found for defendants on theory that laches operated against United States and was a bar to the action, and, United States appealed. The Court of Appeals, Simpson, Circuit Judge, held that laches was unavailable as a defense against the United States in enforcing a public right.

Reversed and remanded.

Appeal from the United States District Court for the Northern District of Alabama.

Before SIMPSON, RONEY and THOMAS A. CLARK, Circuit Judges.

SIMPSON, Circuit Judge:

The United States brought this suit in admiralty under the Rivers and Harbors Act of 1899, 33 U.S.C. §401 et seq., more specifically 33 U.S.C. §§403, 409, 411 and 412, [1] to recover the cost of removing a barge from the bottom of the Tennessee River and statutory penalties. The district court found for the defendants on the theory that laches operated against the United States and was a bar to the action. We reverse.

On January 24, 1949, Barge W-222 sank in the Tennessee River next to the Southern Railroad Bridge at mile 304.4. The barge was in tow of M/V Atco (since renamed M/V Alamo), a tug owned by appellee Tennessee Sand & Gravel Company under bareboat charter to, and being operated by, Arrow Transportation Company (Arrow).

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[1] §403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorizes by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authroized by the Secretary of the Amy; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

§409. Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels.

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

§411. Penalty for wrongful deposit of refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

§412. Liability of masters, pilots, and so forth, and of vessels engaged in violations

Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, 686, and 687 of this title, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vesses, scow, raft, or other craft used or employed in violating any of the provisions of section 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

According to Thomas Harr, the pilot of the M/V Atco and an employee of Arrow, the tow was carrying five barges when he came on watch before midnight, above the Decatur Highway Bridge. Mr. Harr testified that before retiring, Captain Ritchie ordered him to tie off one barge at the grain elevator, 1/10 of a mile upstream from the Keller Memorial Highway Bridge. Harr stated "(he) was too close to (the) bridge when (he) tied the other barge off, and . . .didn't have enough speed to steer the boat properly." The two lead barges including W-222 broke away and drifted downstream. W-222 struck the Southern Railroad Bridge and sank.

Both the Tennessee Valley Authority and the United States Coast Guard were aware of the accident soon after it occurred. Although both investigated the accident and prepared reports on it, the wreck was not marked and no demand was made on the owner or charterer to raise it. The record does not show that the Corps of Engineers was made aware of the sinking and investigation at the time.

In 1972, the United States Corps of Engineers was informed of the wreck by TVA during a routine inventory of the number of vessels in the river. The Corps made soundings of the wreck. On January 30, 1973, the Corps of Engineers wrote Arrow and requested that the sunken barge be removed. When Arrow did not comply, the Corps of Engineers had the barge removed. The work was completed on January 8, 1975, at a cost to plaintiff of $32,727.90. This amount was stipulated below.

On May 12, 1977 the United States brought suit in admiralty to require the in personam defendants to pay the cost of removing the barge from the Tennessee River and statutory penalties under Title 33 U.S.C. §413. The

M/V Alamo was sued in rem. The sinking of the barge was claimed to be caused solely by the negligence of the defendants.

The complaint contained 4 counts. The first asserted that the sunken barge was a public nuisance under federal common law. The second count alleged that the sinking of the barge created an obstruction to navigation in violation of Title 33 U.S.C. §403. The third claim was that the sinking of the barge violated Title 33, U.S.C. §409, which it contended makes the defendants liable under Title 33, U.S.C. §412 for costs of removing the barge and penalties under Title 33 U.S.C. §411. The fourth count charged that the barge sunk due solely to the negligence of the defendants, making them liable for the costs of removal.

The time lapse between the accidental sinking and the filing of suit exceeded 28 years. The defenses asserted were a denial of negligence, a denial that the circumstances permitted suit under Title 33 U.S.C. §§403-412 (the River and Harbor Act of 1899) and finally, laches.

[1] Although the fact situation describes a textbook case of laches, that defense cannot be asserted against the United States in its sovereign capacity to enforce a public right or to protect the public interest. *United States f. California*, 332 U.S. 19, 67 S.Ct. 1658 at 1669, 91 L.Ed. 1889 (1947); *United States v. Summerlin*, 310 U.S. 414, 60 S.Ct. 1019 at 1020, 84 L.Ed. 1283 (1940); *Weiszmann v. Dist. Engl, U.S. Army Corps of Eng.*, 526 F.2d 1302 at 1305 (5th Cir. 1976); *United States v. State of Florida*, 482 F.2d 205 at 569-70 (5th Cir. 1973) (en banc); 77 Am. Jur.2d, United States, §109 (1975).

The trial judge recognized the principle of law just stated and then in a scholarly opinion sought to mold a change in it. In essence, the Court below gave the following reasons for his decision that laches is a defense against the United States:

1) The decisions in which the Supreme Court refused to apply laches to the United States are not recent.

2) Supreme Court precedent for applying laches against the United States is found in *Costello v. United States*, 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961).

3) While there is Fifth Circuit authority for the proposition that the government is not subject to the defense of laches, there is authority to the contrary.

4) E.E.O.C. cases in the Supreme Court and the Fifth Circuit apply laches against the government.

5) The once unquestioned doctrine that governments are generally immune from actions and defenses has been greatly eroded.

We consider each of these reasons in turn. First, although the Supreme Court cases *United States v. California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947) and *United States v. Summerlin*, 310 U.S. 414, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940)—which hold that laches is not a defense against the United States — were decided many years ago, neither has been overruled or modified. Recent cases continue to cite these cases as authority. *See Costello v. United States*, 365 U.S. 265, 81 S.Ct. 534 at 543, 5 L.Ed.2d 551 (1961); *Weiszmann v. Dist. Eng., U.S. Army Corps of Eng.*, 526 F.2d 1302 at 1305 (5th Cir. 1976); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676 at 697 (9th Cir. 1976).

Concerning *Costello v. United States* 81 S.Ct. 534 (1961), the district court opinion stated, "More recently, the Supreme Court assumed that laches was applicable against the United States in a denaturalization proceeding." We do not read *Costello* so broadly. The exact words of *Costello* are, "However, *even if* we assume the applicability of laches, we think that the petitioner failed to prove both of the elements which are necessary to the recognition of the defense." *Costello v. United States, supra*, 81 S.Ct. at 543 (emphasis added). *Costello* by no means holds that laches is applicable against the United States. It merely holds that the petitioner failed to prove both elements of laches so as to require its consideration of that defense. In our opinion *Costello* indicated no charge in existing law.

Nor do we find a single Fifth Circuit case, not involving the E.E.O.C., which has changed the law to apply laches against the United States. Several E.E.O.C. cases were emphasized in the opinion of the District Court and the briefs of counsel. Two Fifth Circuit E.E.O.C. cases in particular were cited by the trial court, namely, *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) and *E.E.O.C. v. Griffin Wheel Co.*, 511 F.2d 456 (5th Cir. 1975). Because the instant case does not involve the E.E.O.C., it is unnecessary for us to reconcile, to interpret or to cite E.E.O.C. cases. Nevertheless, we point out, without adding a non-E.E.O.C. case to the web of the law being woven around E.E.O.C. cases, that close scrutiny of *Georgia Power* reveals the following paragraph:

> Where the government is suing to enforce rights belonging to it, state statutes of limitation are not applicable. *See e.g., United States v. Thompson*, 98 U.S. 486, 488-491, 25 L.Ed. 194 (1878) and *United States v. Summerlin*, 310 U.S. 414, 416-417, 60 S.Ct. 1019 [1020], 84 L.Ed. 1283 (1940). However, this

> principle is not apropos to the present back pay claims. *Insofar as the pattern or practice suit constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action. Cf. United States v. Beebe,* 127 U.S. 338, 346, 8 S.Ct. 1083 [1087], 32 L.Ed. 121 (1888), and *United States v. Smelser,* 87 F.2d 799 (5th Cir. 1937).

United States v. Georgia Power Co., supra, 474 F.2d at 923 (emphasis added). Moreover, a careful reading of *Griffin,* the other E.E.O.C. case cited by the District Court, shows this court may also be approaching it in terms of a "private rights" analysis. *E.E.O.C. V. Griffin Wheel Co., supra,* 511 F.2d at 459. At least one trial judge, who made an exhaustive study of the defense of laches in E.E.O.C. cases, has speculated "that any relief sought by the E.E.O.C. in the form of back wages is a 'private' action to which state statutes of limitations and the doctrine of laches apply." *Equal Employ. Opportunity Com'n v. Bell Helicopter,* 426 F.Supp. 785 at 789 (N.D. Texas 1976). Furthermore, this same opinion suggests that "Pragmatically, the doctrine of laches has no practical application in cases brought by the E.E.O.C. to correct employment discrimination; the doctrine is entirely overlapped by statutes of limitation and by the Administrative Procedure Act, 5 U.S.C. §706". *Equal Employ. Opportunity Com'n v. Bell Helicopter, supra,* 426 F.Supp. at 790. Whether this judge's attempt at reconciling these cases is completely correct or not, such cases are not acceptable authority in the present situation.

Finally, although the trial court correctly stated the general principle that "the once unquestioned doctrine that governments are generally immune from actions and defenses has been greatly eroded" by Congress and

the Supreme Court, neither of these bodies nor the Fifth Circuit has overturned established precedent applicable to the present case.

[2] The trial judge's effort to achieve what he considered an equitable and just result is noteworthy. We do not reverse lightly. Nevertheless, on this set of facts, we believe that the court below erred. The law remains unchanged: laches is unavailable as a defense against the United States in enforcing a public right.

The district judge based his decision entirely on the availability of laches as a defense to an action by the United States and his assessment of the evidence as proving the defense. He concluded his memorandum opinion with the statement, "The court therefore finds it unnecessary to address the other issues and judgment will be entered for defendants."

He left undecided the following issues:

(1) Whether on the facts defendants were negligent;

(2) Whether defendant Arrow was an owner for the purposes of 33 U.S.C. §409;

(3) Whether defendant Arrow violated either 33 U.S.C. §403 or 33 U.S.C. §409 or both; and

(4) Whether 33 U.S.C. §411 penalties should be imposed.

Upon remand the district court will have the opportunity to reconsider the government's argument as to absolute liability. We express no views regarding the discussion of this issue in the opinion of the district court.

We reverse the judgment below and remand for decision by the district court of these issues upon the present or a supplemental record.

REVERSED and REMANDED.

Appendix "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

C.A. 77-M-652

UNITED STATES

Plaintiff

versus

ARROW TRANSPORTATION COMPANY,
TENNESSEE VALLEY SAND & GRAVEL CO.,
in personam and M/V ALAMO (ex-ATCO), etc.

Defendants

March 30, 1979

ORDER

In accordance with the memorandum opinion entered contemporaneously, it is ORDERED, ADJUDGED and DECREED that judgment is hereby entered for defendants. Costs are taxed to plaintiff.

Done this 30th day of March, 1979.

Frank McFadden
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

B-2

C.A. 77-M-652

UNITED STATES

Plaintiff

versus

ARROW TRANSPORTATION COMPANY, TENNESSEE VALLEY SAND & GRAVEL CO., *in personam* and M/V ALAMO (ex-ATCO), etc.

Defendants

MEMORANDUM OPINION

The United States brought this suit under the Rivers and Harbors Act, 33 U.S.C. §401 *et seq.*, to recover the cost of removing a barge from the bottom of the Tennessee River.

The complaint contains four counts. The first contends that the sunken barge was a public nuisance under federal common law. The second count alleges that the sinking of the barge created an obstruction to navigation in violation of 33 U.S.C. §403. The third claim is that the sinking of the barge violated 33 U.S.C. §409, which it is contended makes the defendants liable for the costs of removing the barge and for penalties under 33 U.S.C. §412. The fourth cause of action is that the barge was sunk due solely to the negligence of defendants, making them liable for the costs of removal of the barge.

Defendants deny any liability under any of the theories advanced. Specifically, defendants claim that on or before January 27, 1949, the United States had notice of Barge W-222 sinking and fully investigated the circumstances surrounding the sinking. On February 1, 1949, the United States was informed that no attempt

would be made to raise the barge. Neither the Tennessee Valley Authority, the United States Coast Guard, nor the United States Army Corps of Engineers communicated further with defendants. The United States did not mark or remove the sunken barge. Twenty-four years later, in 1973, demand was made for the removal of the barge. Defendants contend that the sole purpose for the removal of the barge was for the use and benefit of the Southern Railroad in making repairs or renovations to its right of way, i.e., the railroad bridge, across the Tennessee River against which the barge was sunk. Changes to the bridge were under consideration because the bridge constituted a hazard to navigation in that the swing-span was too short and too close to the south bank of the river. Defendants claim that the Barge W-222 was abandoned and at best the United States is entitled to possession of the abandoned barge. Defendants further claim that the government's action is barred under the maritime doctrine of laches.

The case was tried by the court, sitting without a jury. This memorandum opinion is being issued in lieu of findings of fact and conclusions of law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

The court has jurisdiction under 28 U.S.C. §1345. Plaintiff in this action is the United States, and defendants are Arrow Transportation Company, Tennessee Valley Sand and Gravel Company, and M/V Alamo.

On January 24, 1949, the M/V ATCO (now known as the M/V Alamo) was proceeding downstream on the Tennessee River with a tow of four barges. The tow struck the Keller Memorial Highway Bridge at Decatur, Alabama. Barge W-222 broke away from the tow, drifted downstream, and sank in eleven feet of water against one of the piers of the Southern Railroad Bridge at mile

304.4 of the Tennessee River. The barge was chartered to defendants under a bareboat charter. For purposes of the act involved, a bareboat charterer is deemed to be an owner.

Both the Tennessee Valley Authority and the United States Coast Guard were aware of the accident soon after it occurred. Both investigated the accident and prepared reports on it. The wreck was not marked and no demand was made on the owners or charterers to raise it. It is not clear whether the Corps of Engineers was made aware of the sinking and investigation at the time.

In 1972 the United States Corps of Engineers was informed of the wreck by TVA during a routine inventory of the number of vessels in the river. The Corps then made soundings of the wreck. On January 30, 1973, the Corps of Engineers wrote defendants and requested that they remove the sunken barge. Defendants did not remove the barge. The Corps of Engineers, therefore, proceeded to have the barge removed which was completed on January 8, 1975. In the interim between the time the Corps of Engineers wrote defendants and the removal, the wreck was not marked and was not listed on notices to pilots.

On May 12, 1977 this action was filed to require defendants to pay the cost of removing the barge from the Tennessee River.

The delay of over 28 years from the time of the accident until the filing of this action has caused much of the relevant evidence to be unavailable. The report prepared by the Coast Guard has been destroyed. The captain of the ATCO is believed to be dead. Defendants now have no list of the crew of the tugboat or of other possible witnesses to the accident. During such a lengthy delay,

it is reasonable for such information to be destroyed, discarded, or forgotten. However, the pilot of the ATCO is alive and his deposition was taken.

Because of the lengthy delay and the loss of important evidence, defendants have raised the defense of laches. Plaintiff contends that laches is not a defense to an action brought by the United States to enforce a public right. The basis of this contention is that there is a public interest in maintaining navigable waterways and that since the government acts as trustee for all the people in enforcing such an interest, this suit "stands upon a different plane . . . from the ordinary private suit . . ." *Utah Power & Light Company v. United States*, 243 U.S. 389, 409 (1917). Nevertheless, for the reasons stated below this court is of the opinion that laches is an applicable defense against the United States.

First, the decisions in which the Supreme Court refused to apply laches to the United States are not recent. *See United States v. California*, 332 U.S. 19, 40, 67 S. Ct. 1658, 1668 (1947); *United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019 (1940). More recently, the Supreme Court assumed that laches was applicable against the United States in a denaturalization proceeding. *Costello v. United States*, 365 U.S. 265, 282, 81 S. Ct. 534 (1961). Very recently, the Supreme Court noted that a defense like laches would be applicable against actions brought by the Equal Employment Opportunity Commission. *Occidental Life Insurance Co. v. E.E.O.C.*, 432 U.S. 355, 373 (1977). Therefore, the continued validity of these prior decisions is at least open to question.

Second, while there is Fifth Circuit authority for the

proposition that the government is not subject to the defense of laches, there is also authority to the contrary. In several decisions the court has said that the government is not subject to the defense of laches and that the defendant had failed to satisfy the burden for the defense of laches. *Weiszmann v. District Engineer, U.S. Army Corps. of Engineers*, 526 F.2d 1302, 1305-1306 (5th Cir. 1976); *United States v. Florida*, 482 F.2d 205, 210 (5th Cir. 1973). *But see Lucie v. United States*, 474 F.2d 565, 570 (5th Cir., *en banc*, 1973) (where the statement about laches is not a part of the holding); *Chromcraft Corp. v. E.E.O.C.*, 465 F.2d 745, 746 (5th Cir. 1972). However, in *E.E.O.C. v. Griffin Wheel Co.*, 511 F.2d 456, 459 n. 5 (5th Cir. 1975), the court said that even though the government was attempting to vindicate rights belonging to the sovereign, laches would be an applicable defense against the government. *See also United States v. Georgia Power Co.*, 474 F.2d 906, 923 (5th Cir. 1973).

Third, the once unquestioned doctrine that governments are generally immune from actions and defenses has been greatly eroded. The origin of the idea underlying sovereign immunity

> seems to have been the theory, allied with the divine right of kings, that "the King can do no wrong," together with the feeling that it was necessarily a contradiction of his sovereignty to allow him to be sued as of right in his own courts.

W. Prosser, *The Law of Torts, §131 at 970 (4th ed. 1971)*. *The origin is the same for the rule that laches is not applicable against the government. Chromcraft Corp. v. E.E.O.C.*, 465 F.2d 745, 747 n. 2 (5th Cir. 1972); *United States v. 93 Court Corp.*, 350 F.2d 386, 388 (2d Cir. 1965). The underlying idea is obviously outdated. *Nevada v. Hall*, 47 U.S.L.W. 4261, 4263 (5 March 1979).

The decision that best demonstrates the erosion of sovereign immunity is the Supreme Court's decision of *Monnell v. Department of Social Services of the City of New York*, _____ U.S. _____, *98 S. Ct. 2018 (1978), where it overturned nearly two decades of precedent and held that local government may be sued under 42 U.S.C.* §1983. *See also, California v. Arizona*, 47 U.S.L.W. 4174 (February 22, 1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L.Ed.2d 614 (1976). In addition, the courts of many states, including Alabama, have limited the scope of sovereign immunity. *E.g., Berry v. Druid City Hospital Board*, 333 So. 2d 796 (Ala. S. Ct. 1976); *Jackson v. City of Florence*, 294 Ala. 592, 320 So.2d 68 (1975).

Even more importantly, Congress has provided many exceptions to soverign immunity.

> Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens by passing the Tucker Act of 1875, 28 U.S.C. sections 1346, 1491, and the Federal Tort Claims Act of 1946, 28 U.S.C. section 1346(b).

H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4, *reprinted in* [1976] U.S. Cong. & Ad. News 6121, 6124. Congress has exposed the United States to liability in Admiralty, by passing the Suits in Admiralty Act, 46 U.S.C. §741 *et seq.*, and the Public Vessels Act, 46 U.S.C. §781 *et seq.* In 1976, Congress enacted Public Law 94-574, which eliminated

> the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency.

H.R. Rep. No. 1656, *supra* at 3, *reprinted in* U.S. Code Cong. & Ad. News, *supra*, at 6123. Since the United States is now subject to lawsuits seeking equitable relief based on the actions of governmental employees, it seems logical that the United States is subject to equitable defenses based on the actions of governmental employees.

For these reasons, the court is of the opinion that laches is an applicable defense against the United States in this case. The question remains whether laches bars the claim of the United States in this case.

"Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States, supra*, at 1306.

Since the barge sunk in 1949, 28 years before this action was brought, the United States has obviously been less than diligent. Whether defendant has suffered prejudice because of the government's lack of diligence is a more difficult question.

The United States contends that 33 U.S.C. §403 creates absolute liability for "any obstruction not affirmatively authorized by Congress to the navigable capacity of the water of the United States . . ." *See United States of America v. Ohio Barge Line, Inc.*, C.A. 75-783, at 8 (W.D. Pa. 1978). If this were true, then the government would not have to prove negligence by defendant, and defendant would not be prejudiced by its inability to find evidence showing that it was not negligent.

33 U.S.C. §403 provides that:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navibable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

The Fifth Circuit has held that under this statute "a negligent party must raise the vessel or pay for its removal." *United States v. Cargill, Inc.*, 367 F.2d 971, 978 (5th Cir. 1966). The Supreme Court affirmed, but based liability on 33 U.S.C. §409, which expressly addresses sunken vessels. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S. Ct. 379 (1967). Nevertheless, the Supreme Court noted that "[u]nlike a negligent sinking, a non-negligent sinking is not declared by the [Rivers and Harbors] Act to be unlawful." *Id.* at 207, 88 S. Ct. at 388. Therefore, defendants should not be held liable unless they were negligent.

Since the lengthy delay from the time of the accident until the filing of this action prejudiced defendant's ability to prove that it was not negligent, the court is of the

opinion that laches is a bar to this action.

The court therefore finds it unnecessary to address the other issues and judgment will be entered for defendants.

Frank McFadden
Chief Judge

March 30, 1979

Appendix "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT B

NO. 79-2290

UNITES STATES OF AMERICA,
Plaintiff-Appellant,

versus

ARROW TRANSPORTATION COMPANY
TENNESSEE VALLEY SAND & GRAVEL
COMPANY, in personam and M/V
ALAMO (ex-ATCO(, ETC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 8, 1981, 5 Cir., 198__, _____ F.2d _____).

Nov. 9, 1981

Before SIMPSON, RONEY and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452 — October 14, 1981)

Appendix "D"

October 3, 1973

ORNOP-W

Mr. Howard King
President
Arrow Transportation
Tennessee Valley Sand and Gravel
P.O. Box 520
Sheffield, Alabama 35660

RE: Sunken Barges and Dock Barges
Located on Tennessee River

Dear Mr. King:

Reference is made to my letters of 19 January 1973, 6 February 1973, and 3 May 1973 concerning removal of five sunken barges and repair or removal of a number of dock barges on the Tennessee River. Reference is also made to a letter from Mr. William K. Nestor, copy of which is attached, dated 4 August 1973 relating specifically to the barges located at Mile 193.0 and Mile 304.4. Since our records indicate that Arrow Transportation Company and Tennessee Valley Sand and Gravel Company are the owners of these barges, it is not clear why Mr. Nestor suggested that correspondence concerning these barges should be addressed to Bradshaw and Weil Marine Agency, Inc., and McDonough Marine Service, respectively. I understand that Mr. Nestor has verbally advised that your companies are negotiating with Serodino, Incorporated, concerning the barges at Wolf Island.

The barge located against the upstream side of the Southern Railroad bridge at Mile 304.4, Tennessee River, is presently of major concern. The expeditious removal of this barge is necessary because it is located in the channel opening of a lift span to be constructed in this bridge to replace the existing swing span. This necessitates the removal of this barge prior to beginning construction; therefore, we request that you submit plans for removal of this barge. The plans should provide that removal will be completed on or before 1 January 1974. If the barge has not been removed by this date, it will be removed by Government contract. In this case, Arrow Transportation Company will be billed for the cost of removal.

ORNOP-W

Mr. Howard King

We feel that Arrow Transportation Company and Tennessee Valley Sand and Gravel Company have had ample time to submit plans for corrrecting these problems. Therefore, we ask that you submit plans for removal of your sunken barges located at Mile 193.0, and 193.5, and 336.7 and for satisfactorily repairing the previously mentioned dock barges. The dock barges will be approved, if acceptable, by a Department of the Army Permit.

The requested plans should be submitted by 25 October 1973.

Sincerely yours,

WM. F. BRANDES
Colonel, Corps of Engineers
District Engineer

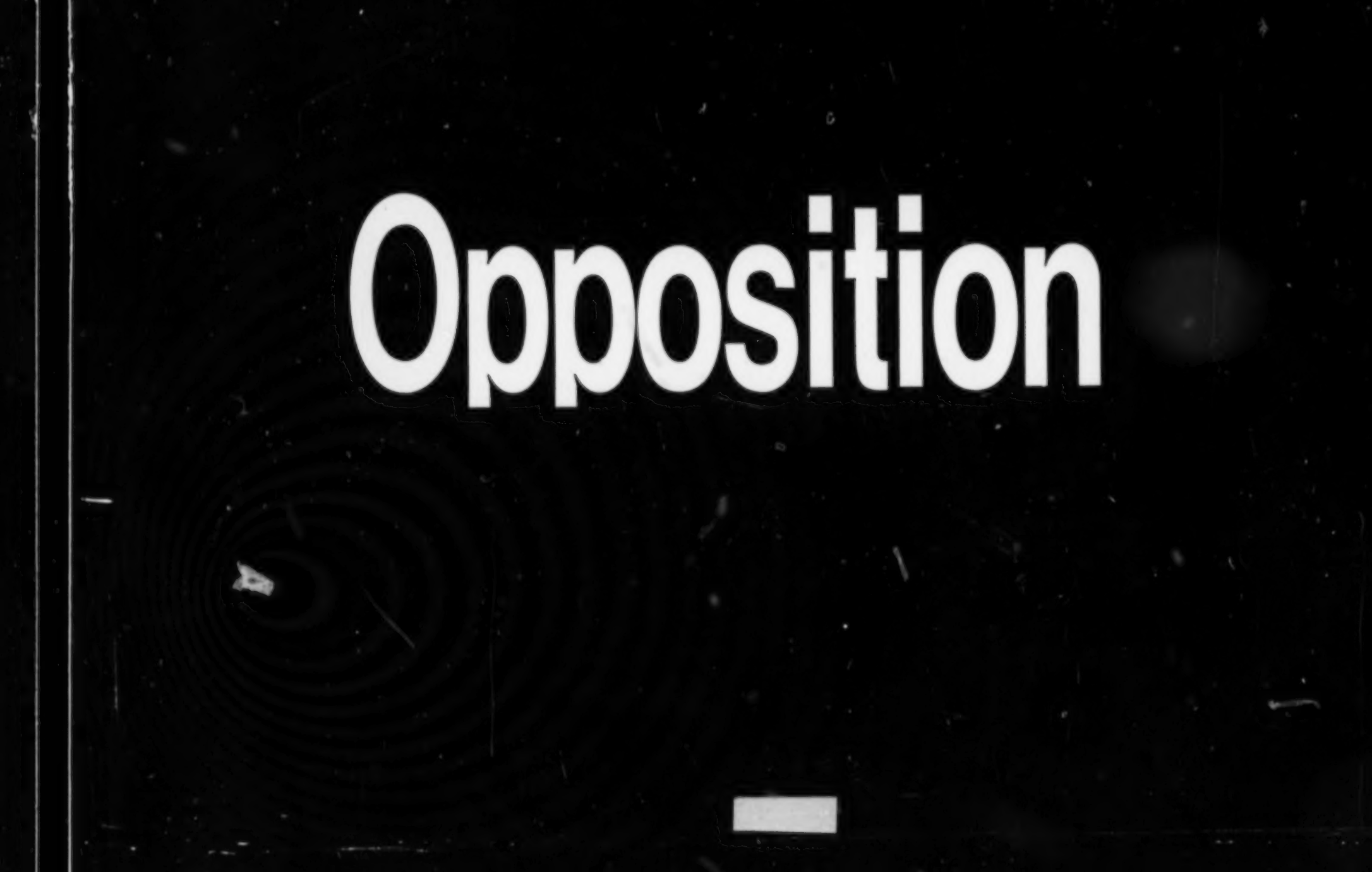
2 Encl.
1. Cy ltr to Mr. Nestor
   dtd 19 Jan. 73
2. Cy ltr fr Mr. Nestor
   dtd 4 Aug. 73

CF:
Mr. Robert B. Nichols
Chief, Navigation Engineering Branch
Tennessee Valley Authority
605 Arnstein Building
Knoxville, Tennessee 37902

CERTIFICATE

I do hereby certify that I have on this _____ day of _____, 1981, served a copy of the foregoing pleading on all counsel for all parties to this litigation by mailing same by United States mail, properly addressed, first class postage prepaid.

Opposition



Office - Supreme Court, U.S.
FILED
MAR 11 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1338

In the Supreme Court of the United States

OCTOBER TERM, 1981

ARROW TRANSPORTATION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

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QUESTION PRESENTED

Whether the defense of laches is available in a suit by the United States under the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, to recover the costs of removing a sunken vessel from the navigable waters of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1338

ARROW TRANSPORTATION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 658 F. 2d 392. The opinion of the district court (Pet. App. B-1 to B-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1981, and a petition for rehearing was denied on November 9, 1981 (Pet. App. C-1 to C-2). The petition for a writ of certiorari was filed on January 6, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The applicable sections of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, 409, 411 and 412, are set out at Pet. 4-6 and in the opinion of the court of appeals (Pet. App. A-2 to A-4).

STATEMENT

In January 1949, Barge W-222 sank in the Tennessee River against a pier of the Southern Railroad Bridge at mile 304.4 The barge was in tow of the *M/V Atco* (since renamed *M/V Alamo*) a tug owned by Tennessee Sand and Gravel Company under bareboat charter to, and operated by, petitioner Arrow Transportation Company (Pet. App. A-2).

The Tennessee Valley Authority and the United States Coast Guard were aware of the accident soon after it occurred, but no demand was made on the petitioner to raise the wreck at that time (Pet. App. A-5). Sometime later, in 1972, the United States Army Corps of Engineers became aware of the sunken barge in the river and promptly requested petitioner to remove it (*ibid.*). When petitioner did not comply, the Corps of Engineers had the wreck removed. The work was completed in January 1975 at a cost to the government of $32,729.90 (*ibid.*).

In May 1977, the government commenced this action in the United States District Court for the Northern District of Alabama under the Rivers and Harbors Act of 1899, 33 U.S.C. 403, 409, 411 and 412, against the petitioner, the barge owner, and the tug in rem, to recover the costs of removing the wreck (Pet. App. A-5 to A-6). The defendants asserted, *inter alia*, the defense of laches (Pet. App. B-5). The government contended that laches does not apply to a suit such as this one, in which the government seeks to enforce a public right (here, recovery of the cost of removal of obstructions in the navigable waterways). The government further argued that in any event, the defendants could not be prejudiced by the passage of time because liability under the statute is absolute. The district court ruled, however, that laches is available against the government in this context (*id.* at B-8). The court further concluded that liability in this action could be based only on negligence, not

absolute liability (*id.* at B-9). Therefore, in the court's view, the government's suit was barred by laches because the delay in bringing the action had prejudiced the defendants' ability to prove that the sinking of the barge was not due to their negligence (*id.* at B-9 to B-10).

The court of appeals reversed on the basis of this Court's decisions in *United States* v. *California*, 332 U.S. 19 (1947), and *United States* v. *Summerlin*, 310 U.S. 414 (1940), holding that laches is not a defense against the United States (Pet. App. A-1 to A-11). This principle, the court of appeals noted, has not been overruled or modified, and has been consistently applied by this Court (see *Costello* v. *United States*, 365 U.S. 265, 281 (1961)), as well as in recent decisions of the courts of appeals (Pet. App. A-7). The court of appeals distinguished its own prior decisions holding that laches is applicable against the government in suits brought by the Equal Employment Opportunity Commission, *United States* v. *Georgia Power Co.*, 474 F. 2d 906 (5th Cir. 1973) and *EEOC* v. *Griffin Wheel Co.*, 511 F. 2d 456 (5th Cir. 1975), on the ground that those actions involved enforcement of the private rights of individual citizens rather than recovery of sums due the Treasury (Pet. App. A-8 to A-9). Those decisions, the court held, are therefore inapplicable to a suit, such as this one, to enforce a public right (*id.* at A-8 to A-10). Finally, in remanding the case to the district court for decision of the remaining issues, the court "express[ed] no views" regarding the district court's conclusion that liability in this action could be based only on negligence, and observed that "[u]pon remand, the district court will have the opportunity to reconsider the government's argument as to absolute liability" (*id.* at A-10 to A-11).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other

court of appeals. Accordingly, further review is unwarranted.

1. It is well established that laches is not available as a defense against the United States in a suit to enforce or vindicate a public right, *Costello* v. *United States*, 365 U.S. 265, 281 (1961); *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940). As the court of appeals correctly noted (Pet. App. A-7), this Court has never questioned the continued validity of this principle, and recent cases in the lower courts consistently have applied it. See *Silverman* v. *CFTC*, 549 F. 2d 28, 34 (7th Cir. 1977); *Weiszmann* v. *District Engineer, U.S. Army Corps of Engineers*, 526 F. 2d 1302, 1305 (5th Cir. 1976); *United States* v. *Overman*, 424 F. 2d 1142, 1147-1148 (9th Cir. 1970); *FMC* v. *Caragher*, 364 F. 2d 709 718 (2d Cir. 1966).

Petitioner cites no contrary authority. In *United States* v. *Wilson*, 235 F. 2d 251, 252 (2d Cir. 1956); *Hines, Inc.* v. *United States*, 551 F. 2d 717, 729 (6th Cir. 1977); and *United States* v. *Boyd*, 520 F. 2d 642, 645 (6th Cir. 1975), the courts did not decide the issue presented here. *United States* v. *Bailey*, 467 F. Supp. 925 (E.D. Ark. 1979), involved the entirely separate question of the applicability of the doctrine of equitable estoppel against the government. The decision in *United States* v. *The Richard J. Moran*, 201 F. Supp. 570 (D. Me. 1962), a libel in rem brought by the United States for collision damage, rested on a narrow exception, recognized by some lower federal courts, permitting the application of laches where the rights of a subsequent bona fide purchaser of the libeled vessel would be prejudiced. Whatever the validity of that exception in appropriate cases, it has no application here. Finally, suits brought by the EEOC, such as *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), *United States* v. *Georgia Power Co.*, 474 F. 2d 906 (5th Cir. 1973) (as amended on denial of rehearing), and *EEOC* v. *Griffin*

Wheel Co., 511 F. 2d 456 (5th Cir. 1975), are clearly distinguishable for the reasons stated by the court of appeals. In those cases laches was applied only against the government's efforts to enforce the private rights of individuals to back pay. Those decisions are not inconsistent with the principle that laches is unavailable where, as here, the United States seeks to enforce a sovereign right to repayment of costs expended by the Treasury. "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes * * *" (*United States* v. *California*, 332 U.S. 19, 40 (1947)). The court of appeals thus correctly refused to apply laches to this action, and properly remanded the case for further proceedings.[1]

2. Petitioner also seeks review on the issue of the applicable standard of liability in this case (Pet. 20-26). But the court of appeals expressed no view on that issue; it instead

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[1] Petitioner argues (Pet. 18-20) that the United States is not enforcing a public right in this action, but rather is acting on behalf of the Southern Railroad Company in removing the sunken barge that would have presented an obstruction to navigation when the railroad, in rebuilding its bridge, removed the pier against which the sunken barge was resting. This argument plainly lacks merit. The Rivers and Harbors Act gives the Secretary of the Army and the Army Corps of Engineers responsibility for maintaining the navigable waters safe and unobstructed, 33 U.S.C. 401, and the law is clear that the United States can recover expenditures for the removal of wrecks from navigable waters. *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967); *University of Texas Medical Branch at Galveston* v. *United States*, 557 F. 2d 438, 444 (5th Cir. 1977), cert. denied, 439 U.S. 820 (1978). The happenstance that the sunken barge came to rest against the railroad bridge did not make it the railroad's obligation to remove the wreck from the waterway; under the statute, that responsibility was, and remained, petitioner's. When the Corps of Engineers proceeded to remove the wreck upon petitioner's failure to fulfill that responsibility, and sued to recover the resulting removal costs incurred by the government, the Corps was acting to enforce a sovereign right.

remanded to the district court for reconsideration of whether petitioner may be held absolutely liable in these circumstances. The question thus is interlocutory and is not properly presented for the Court's review at this time. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-258 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1982

DOJ-1982-03